In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-501

MICHAEL D. MICHAEL,

Petitioner,

— *v.* —

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT

RICHARD A. HENNESSY, JR.
District Attorney
Onondaga County Civic Center
Syracuse, New York 13202

JOHN A. CIRANDO, ESQ.
Assistant District Attorney
Of Counsel.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statement of the Case	2
Facts	3
ARGUMENT:	
POINT I — Petitioner presents no "special and important reasons" to warrant this Court's examination of the decisions below	4
CONCLUSION — For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied	8
Appendix A — Deposition of Joseph A. Shue, the Complainant, a Police Officer	A1

Table of Authorities:

Cases:

Cardinale v. *Louisiana*, 394 U.S. 437 (1969)	7
Delaware v. *Prouse*, 440 U.S. ___, 99 S.Ct. 1391 (1979)	5, 8
Layne & Bowler Corp. v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)	4
Mapp v. *Ohio*, 367 U.S. 643 (1961)	5
Matter of DeVito, 77 Misc.2d 524 (Jeff.Co.Sup.Ct. 1974)	6
People v. *Dawley*, 19 N.Y.2d 663, 664 (1967)	6
People v. *Dickman*, 42 N.Y.2d 294, 297-298 (1977)	8
People v. *Mayrant*, 43 N.Y.2d 236, 239 (1977)	8
People v. *Sandoval*, 34 N.Y. 371 (1974)	8
People v. *Wright*, 41 N.Y.2d 172, 175 (1972)	8

Page

Spinelli v. *United States*, 393 U.S. 410 (1969) 8

Tacon v. *Arizona*, 410 U.S. 351,353 (1973) 7

Statutes:

New York Vehicle and Traffic Law:

§504(1) 2, 4, 5, 6, 7

§1192(2), (3), & (5) 2, 5

§1120(a) 2

28 U.S.C. §1257(3) 1

Miscellaneous:

Rules of the Supreme Court, Rule 19 4

Message of the Governor, 1961 McKinney's Session Laws, p. 2132 6

In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-501

MICHAEL D. MICHAEL,

Petitioner,

— *v.* —

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT

OPINIONS BELOW

The Onondaga County Court's Memorandum/Order dated May 9, 1978, denying petitioner's motion to suppress, is not published. The Memorandum filed by the New York State Supreme Court, Appellate Division, Fourth Department, affirming petitioner's conviction on June 1, 1979, has not yet been reported and appears in Petitioner's Appendix at pp. A-A-2. Petitioner's application for permission to appeal to the New York Court of Appeals was denied on June 26, 1979, and appears in Petitioner's Appendix at pp. B-B-1.

JURISDICTION

Petitioner is seeking a writ of certiorari to the New York Supreme Court, Appellate Division, Fourth Department, pursuant to Title 28 USC §1257 (3).

QUESTION PRESENTED

1. Do Petitioner's claims constitute "special and important reasons" warranting this Court's review on a writ of certiorari?

STATEMENT OF THE CASE

Petitioner was indicted for OPERATING A MOTOR VEHICLE WHILE IN AN INTOXICATED CONDITION (as a Felony), OPERATING A MOTOR VEHICLE WHILE HAVING .10 OR MORE OF ONE PERCENTUM BY WEIGHT OF ALCOHOL IN HIS BLOOD (as a Felony), and FAILING TO KEEP RIGHT in violation of the New York Vehicle and Traffic Law §§1192(3), 1192(2), and 1120(a), respectively (9). On July 5, 1978, petitioner pled guilty to the crime of OPERATING A MOTOR VEHICLE WHILE IN AN INTOXICATED CONDITION (as a Misdemeanor). He was sentenced on September 8, 1979 to serve an intermittent 20-day weekend term of imprisonment and probation for a period of two years, eleven months and ten days (3).

On October 10, 1978 petitioner filed a notice of appeal (2), and on his direct appeal challenged his conviction on the ground that since the arresting officer learned over the police radio of his prior Driving While Intoxicated conviction, his arrest was in violation of Vehicle and Traffic Law §504(1) which provides that a licensee's detachable conviction stub shall not be subject to inspection by a policeman. The Supreme Court of New York, Appellate Division, affirmed his conviction, holding that petitioner's stop and arrest were proper and that since he was not required to and did not show the arresting officer his detachable conviction stub, Vehicle and Traffic Law §504(1) was not violated (___ A.D.2d ___, 6/1/79, 4th Dept.). Leave to appeal this decision was denied by Associate Judge Hugh R. Jones of the New York Court of Appeals on June 26, 1979, there being "no question of law presented which ought to be reviewed by the Court of Appeals . . . ." (___ N.Y.2d ____, 6/26/79).

Petitioner now challenges the aforementioned decision of the New York Supreme Court, Appellate Division, Fourth Department.

FACTS

At approximately 2:15 a.m. on November 3, 1977, while on routine patrol, Officer Shue of the North Syracuse Police Department observed petitioner driving at a very slow rate of speed and swerving from one side of the road to the other (Appendix A). When he subsequently stopped petitioner and requested to see his license, petitioner had a great deal of trouble finding it, and smelled of alcohol (Appendix A). Furthermore, when asked to get out of the car, petitioner was unable to walk steadily (Appendix A). These facts and others led Officer Shue to believe that petitioner was intoxicated, and he accordingly placed petitioner under arrest, at some point learning that petitioner had previously been convicted of Driving While Intoxicated in 1972 (Appendix A; 18). However, Officer Shue never saw petitioner's detachable conviction stub, learning of his prior conviction only be means of a police radio communication (4-5; 15-16). Petitioner's motion to suppress any evidence obtained subsequent to his arrest was denied by the Onondaga County Court (Gale, J.) (4-7).

Petitioner's jury trial commenced on June 13, 1978, but on June 16, 1978 the jury was discharged since it was unable to agree on a verdict (8). Thereafter, on July 5, 1978, petitioner entered a plea of guilty to OPERATING A MOTOR VEHICLE WHILE IN AN INTOXICATED CONDITION (as a Misdemeanor) in full satisfaction of the indictment (3).

ARGUMENT

POINT I

PETITIONER PRESENTS NO "SPECIAL AND IMPORTANT REASONS" TO WARRANT THIS COURT'S EXAMINATION OF THE DECISIONS BELOW.

Rule 19 of the Rules of the Supreme Court states in part that "(a) review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Mr. Chief Justice Taft, speaking for a unanimous court, noted in reference to the writ:

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . . *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Clearly, the issue presented by petitioner in the case at bar meets none of these criteria and instead relates to matters of importance to petitioner alone rather than to the public in general. Moreover, while petitioner seeks to characterize the issue in this case as a constitutional one so as to justify review by this Court on certiorari, it is only too obvious that the only issue at bar is the interpretation of New York Vehicle and Traffic Law §504(1), providing that a licensee's detachable conviction stub shall not be subject to inspection by a policeman, but shall be shown on demand only to a judge or hearing officer after conviction, a matter long since decided by the appellate courts in the State of New York. Thus, there are no important questions of federal law that would require this Court's examination of this case.

. . . as to the claim that the officer's independent knowledge of the prior conviction violates his right to be free from unreasonable searches and seizures

In an attempt to couch his claim in constitutional terms so as to justify this Court's review, petitioner first claims that the call

over the police radio concerning his prior conviction somehow violated his Fourth Amendment rights to be free from unreasonable searches and seizures, in that Vehicle and Traffic Law §504(1) gave him an expectation of privacy in his prior record (Petitoner's Petition and Brief, pp.11-14). Despite these manipulations otherwise, it is clear that the only issue in this case was whether New York Vehicle and Traffic Law §504(1) was violated, which it wasn't.

It must initially be noted that even if one could consider the officer's call over the police radio to be in violation of Vehicle and Traffic Law §504(1), that call *in no way* contributed to petitioner's stop or arrest. The record reveals and the Appellate Division properly found that petitioner's arrest was predicated only upon the officer's initial observation of his car swerving from one side of the road to another, his subsequent fumbling, his difficulty in walking, and the strong odor of alcohol on his breath. Appendix A; *cf. Delaware* v. *Prouse*, 440 U.S. _____, 99, S.Ct. 1391,1400 (1979). Thus, the radio call to ascertain if petitioner had any prior Driving While Intoxicated convictions, even if "illegal", was entirely irrelevant; it is only evidence which is a *product* of illegal police activity which is subject to the exclusionary rule. *Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961).

Moreover, it is obvious that the *only* reason the officer obtained the information concerning petitioner's prior conviction in the first place was to ascertain whether the charge against him was a felony or a misdemeanor. Under the provisions of New York Vehicle and Traffic Law §1192(5), a Driving While Intoxicated *misdemeanor* offense is elevated to a *felony* only by reason of a prior §1192(2) or (3) conviction in the preceding ten years. Accordingly, there was absolutely no way for the officer, or anyone else for that matter, to know whether to charge appellant with a felony or misdemeanor *without* inquiring into any past convictions, as was properly done in this case. As such, petitioner's assertion that Vehicle and Traffic Law §504(1) mandates complete ignorance of a defendant's

prior traffic convictions is absurd. As the trial court properly recognized, certainly such a result was not intended by the New York Legislature in enacting this statute (6-7).

Indeed, a reading of the reasons behind the enactment of Vehicle and Traffic Law §504(1) shows the legislature's concern was not over the police's knowledge of a defendant's past convictions, but over the defendant's right to be convicted or acquitted solely on the facts of the particular case. As Governor Rockefeller, on approving the statutory provision for a detachable conviction stub, stated:

> It is appropriate and consistent with our concepts of a fair hearing that one charged with an offense be convicted or acquitted of such offense on the basis of the particular facts of that occasion. Prior to conviction an individual's past record has no relevance to the determination of whether a new offense was actually committed. Message of the Governor, 1961 McKinney's Session Laws, p. 2132.

Thus, a furtherance of the legislative reasons for enacting Vehicle and Traffic Law §504(1) would require only that all knowledge of a defendant's prior record be kept from the trier of facts. This principle was explicitly recognized in *Matter of DeVito*, 77 Misc.2d 524,527, Jeff.Co.Sup.Ct. (1974), where it was held that even though the trial judge improperly knew about appellant's prior convictions as recorded by the New York State Department of Motor Vehicles, there was no resulting prejudice to that defendant since the judge was not the trier of facts.

The only right to privacy petitioner could reasonably expect by operation of Vehicle and Traffic Law §504(1) was the right to withhold his *conviction stub* from the authorities prior to his conviction. This right was fully exercised here. Moreover, it is well settled under New York Law that the provisions of the instant section are restricted to those matters specifically mentioned therein. *People* v. *Dawley*, 19 N.Y.2d 663,664 (1967). Since the arresting officer herein did not at any point in this case see or ask to see petitioner's conviction stub, there

was simply no violation of the provisions of Vehicle and Traffic Law §504(1). In addition, on the facts of this case, where the only reasons for acquiring this knowledge was to determine whether petitioner was to be charged with a felony or a misdemeanor, the reasons behind the enactment of §504(1) were not violated either. Accordingly, petitioner's contentions are completely without merit.

. . . as to petitioner's claim that he was precluded from cross-examining the officer regarding his consideration of the prior conviction

Petitioner *for the first time* in this Court makes the claim that he was somehow denied his constitutional right to cross-examine the arresting officer regarding his consideration of petitioner's prior conviction when making this arrest. It is well settled that this Court will not consider matters not raised before the courts below even when the alleged constitutional errors involve a claimed violation of due process at a criminal trial. *Tacon* v. *Arizona*, 410 U.S. 351,353 (1973); *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969). Petitioner has nowhere below either raised this issue or asserted any prejudicial effect due to this matter, and it is respectfully submitted that he should now be so precluded.

In any event, petitioner's complaint that he was somehow denied his right to cross-examine the arresting officer concerning his decision to arrest him is completely ludicrous. In the first place, it is uncontroverted that petitioner chose to plead guilty rather than to proceed to trial. As such, it is extremely difficult to *seriously* entertain his claim of a denial of cross-examination at this time.

In the second place, had petitioner in fact chosen to proceed to trial, respondent knows of no rule which would have forbidden him from cross-examining the officer regarding probable cause for petitioner's arrest, including any consideration by the officer of petitioner's prior conviction. The New York rule of

law designed to preclude admission of a defendant's prior convictions at trial as enunciated in *People* v. *Sandoval*, 34 N.Y.2d 371 (1974), was promulgated *solely* for the benefit of the defendant. See *People* v. *Mayrant*, 43 N.Y.2d 236,239 (1977); *People* v. *Dickman*, 42 N.Y.2d 294, 297-298 (1977); *People* v. *Wright*, 41 N.Y.2d 172,175 (1972). Obviously then, if the defendant himself elicits evidence of his prior convictions, such evidence is entirely proper.

More importantly, however, while a "criminal record" in itself is insufficient to justify a stop and arrest and therefore is violative of the Fourth Amendment. See *Delaware* v. *Prouse*, *supra* at _____, 99 S.Ct. at 1400; *Spinelli* v. *United States*, 393 U.S. 410,418-419 (1969). Such was not the case in the instant petition. Accordingly, petitioner's right to cross-examination was neither abridged *hypothetically* or in reality.

CONCLUSION

FOR THE FOREGOING REASONS, IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

RICHARD A. HENNESSY, JR.
District Attorney
Onondaga County Civic Center
Syracuse, New York 13202

JOHN A. CIRANDO, ESQ.
Assistant District Attorney
Of Counsel.

Dated: October 22, 1979.

APPENDIX

APPENDIX A – Deposition of Joseph A. Shue, the Complainant, a Police Officer.

DEPOSITION

ONONDAGA COUNTY SHERIFF'S DEPARTMENT

State of New York
County of Onondaga } SS.:
Town of North Syracuse
Village

Case Complaint No. A77-24

People of the State of New York
vs.
Michael D. Michael
Defendant

I, Joseph A. Shue, the complainant, a police officer residing at Village of North Syracuse, New York

By this supporting deposition, make the following allegations of fact in connection with an accusatory instrument filed, or to be filed, with this court against the above named defendant :

At about 2:15 AM on the 3rd day of November, 1977 as I was on routine patrol in the Village of North Syracuse, I did observe a 1967 Dodge, bearing NY Reg 918 RXM traveling south on Rt 11, this vehicle was traveling at a very slow rate of speed and swerving from oneside of the road to the other. I stopped the vehicle and requested of the driver to see his license and registration, the driver of the vehicle is the defendant in this case, Michael D. Michael. The defendant had a great amount of trouble finding the items I requested. I also observed at this time that there was a very strong smell of some type of alcoholic beverage coming from his mouth. I had the defendant get out of his car and noticed that his walk was unstable. These and other actions lead me to believe that the defendant was intoxicated at this time and place. Defendant was placed under arrest given the warning concerning refusal to submit to chemical test and he stated that he would take the breath test. Subject was also given his rights under miranda. Defendant transported to the North Syracuse Police Dept where a breath-

APPENDIX A — Deposition of Joseph A. Shue, the Complainant, a Police Officer.

alyzer test was given by Sgt. C. Vinch with a result of .21% blood alcohol. It was also determined that the defendant had received a prior conviction for section 1192.3 of the N,Y,S, V & T Law on the 16th of June 1972. Defendant was arraigned, to reappear on the 7th day of November.

NOTE: False statements made herein are punishable as a Class A Misdemeanor pursuant to Section 210.45 of the Penal Law of the State of New York.

Sworn to before me this
___ day of _____ 19___

_____

_____

AFFIRMED UNDER PENALTY OF PERJURY this
4th day of November 1977

Joseph A Shue
COMPLAINANT